IN THE CIRCUIT COURT OF FRANKLIN COUNTY.*

NORFOLK & WESTERN RAILWAY CO. v. R. M. YOUNG.

1. RAILWAY COMPANIES—*Contract against liability for negligence.*—Under a contract between a railway company and a dealer in scrap iron and tan bark, whereby it was agreed that scrap iron and tan bark should be stored upon the premises of the company, upon the condition that the company should "not be in any way responsible for any damage to the scrap iron and tan bark, or its contents, or any part thereof, by fire or any casualty whatsoever resulting from the use of its engines on the road or otherwise," and the property was not stored for shipment, nor was at any time in the custody or possession of the company or its agents, it was held:

(1) The written contract fixed the relation between the parties, and the railway company was not even a gratuitous bailee of the dealer's bark.

(2) The railway company, as a common carrier, was not compelled to furnish a place to store bark upon its premises, and, therefore, with reference to such a matter, could make such contract as it saw fit, including a contract against liability for negligence.

2. RAILWAY COMPANIES—*Duty to shipper commences upon delivery and acceptance.*—The duties and obligations of a common carrier with respect to goods commence with their delivery to the carrier, and this delivery must be complete, so as to put upon it the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely with one or the other, and until it has become imposed upon the carrier by the delivery and acceptance, it cannot be held responsible for them.

3. RAILWAY COMPANIES—*Delivery at usual place.*—If goods are delivered for carriage, of which the company has notice, and the place to which they are delivering is the usual place for receiving similar articles, then the responsibility of the company attaches.

4. RAILWAY COMPANIES—*Liability as to goods deposited to await orders of shipper.*—The responsibility of a carrier attaches upon delivery of goods at its warehouse, unless there are special directions given by the owner; but it is not liable as a common carrier for property deposited in its warehouse to await orders for transportation.

5. RAILWAY COMPANIES—*Liability as to goods stored awaiting necessary cars.*—Goods stored along the line of a railway company awaiting shipment, where the owner is to load them when he can get necessary cars, are not completely delivered to the railroad company until they are so loaded and ready for shipment.

*Reported by George C. Gregory.

6. RAILWAY COMPANIES—*Liability of when gratuitous carriers.*—Common carriers, if gratuitous carriers of goods, will be liable only for losses occurring through gross negligence.

7. RAILWAY COMPANIES—*Common carrier defined.*—A common carrier is one who undertakes a business for hire, or reward, to carry from one place to another the goods of all persons who may apply for such carriage, provided the goods be of the kind which it professes to carry. and the person so applying agree to have them carried upon the lawful terms prescribed by the carrier, and who, if he refuse to carry such goods for those who are willing to comply with its terms, becomes liable to an action by the aggrieved party for such refusal.

8. RAILWAY COMPANIES—*Bailment defined.*—The word bailment is one of comprehensive signification, and includes cases in which personal property is intrusted by one person to another by engagement, express or implied, to keep, to carry, to improve, to mend, to repair, or for the purpose of having any special service performed in respect to it, and when this special service shall have been accomplished. to return to the owner or deliver it to another, according to the bailor's directions. or to conform to the object or purpose of the trust whatever it may be.

The opinion states the case.

HON. E. W. SAUNDERS, Judge:

In this case it appears that the plaintiff was a dealer in tan bark at the Ferrum depot in this county.

Wishing to store his bark at some convenient place as rapidly as it was delivered by his customers, he entered into the following contract with the railroad company:

CONTRACT.

"Norfolk and Western Railroad Company.

"Contract for the use of the company's property. This agreement made and entered into this October 12th, 1899, between the Norfolk and Western Railway Company of the first part, and Ro. M. Young of the second part, Witnesseth: That whereas it is proposed by the said R. M. Young to store scrap iron and tan bark on the premises of the Norfolk and Western Railway Company, in the State of Virginia, county of Franklin, town of Ferrum, M. P. Ferrum yard, at such point on said premises as may be designated by the said company, as indicated on plan attached, which plan is made a part of this agreement, and the said Norfolk and Western Railway Company assenting thereto. Now therefore, for and in consideration of the premises, the said party of the first part doth hereby grant, and permit to the said party of the second part, the use and occupation of so much ground within said premises, as may be necessary for.....upon the following terms, and conditions to-wit: 1st.—That the scrap iron and tan bark to be so placed upon the said company's premises, shall be such as its Vice-Presi-

dent and General Manager shall approve, and during continuance of the same, shall be kept in good order by the party of the second part, at his own exclusive cost, and as the said company's vice-president, and general manager, may from time to time prescribe. That the said Norfolk and Western Railway Company shall not be in any way responsible for any damage to scrap iron, and tan bark, or its contents, or any part thereof by fire or other casualty whatsoever, resulting from the use of its engines on the road, or otherwise. Witness the obligations of the respective parties to this agreement.

"Witness—A. L. Lemon. "Norfolk and Western Railway Company,
"By.....
"Vice-President and General Manager.
"R. M. YOUNG."

The plaintiff states that subsequent to the execution of this contract he selected a place on the right of way of the company, on the east side of the track, and proceeded to deposit there considerable quantities of bark "for shipment." This may have been the ultimate purpose of Mr. Young, but at the time of the storage there was no present contract of shipment with the railroad company.

The place chosen was selected by the plaintiff on account of its apparent safety, and as a convenient place from which his bark might be loaded at some future time upon the cars of the defendant company. It does not appear that the company ever designated, or formally approved, the place selected by Mr. Young, but the local agent of the company, Mr. Lemon, who witnessed the contract, was aware of Mr. Young's selection, saw him constantly at work at that point, and made no objection. After Mr. Young had completed the erection of a large rick of bark, there came a heavy fall of rain, not heavy and unusual enough to be designated as an act of God, but almost coming within that designation. At some time while this rain was falling, a culvert to the north of the rick became choked, thus impounding a large quantity of water, and causing it to back up on the plaintiff's bark, to the height of a few feet.

The damage caused by this backwater was considerable. It is not very clear how, or when, the culvert became choked. Some of the testimony indicates that, at some time prior to the rain, the passage of heavy trains over the culvert had broken the terra cotta piping of which it was constructed. Thus the culvert, which, even in its broken condition, was adequate to carry off the feeble stream of water which usually trickled through it, or even the floodwater of a moderate rain, was totally inadequate to carry off the great

volume of water which pressed upon it at the time in question. It is indicated by other portions of the testimony, that the breakdown of the culvert was due to initial inadequacy of construction. In the argument of the case, it was contended by the counsel for the plaintiff, that the culvert was not broken prior to the "big rain," but that the logs, sticks, and debris hurled into the culvert by the flood waters of August, 1901, broke it at that time.

It appears that there were two heavy falls of rain during August, and that the first choked the culvert, and backed water on the bark, during the night. As soon as this was discovered in the morning the employes of the company waded in, and removed a quantity of debris from the broken culvert, thus allowing the impounded waters to escape. A week later another considerable rain choked the culvert, and backed water upon the bark, which in the meantime had not been removed by the plaintiff. After this, the culvert was opened and repaired. It is established by the evidence that the damage to the plaintiff's bark was occasioned in about equal measure by the two rains. The plaintiff was cognizant of the injury done to his property by the first rain, but made no effort to remove it before the second storm.

The written contract fixes the relations between the parties, and the terms upon which the plaintiff entered upon and occupied the defendant's property. The defendant was in no sense a bailee of the plaintiff's bark, not even a gratuitious bailee. It did not undertake to do anything in or about the bark. The plaintiff sought to secure, and did secure, a place of storage for his own property, for his own purposes, and for his own convenience. The company was willing to afford this place, but was unwilling to assume any responsibility in connection with the property stored thereon. The property was not received by the company in contemplation of shipment—in fact, it was not offered for shipment. Mr. Young was under no obligation, express or implied, to ship his bark over the defendant's road. Whatever might have been the plans of the plaintiff with reference to this bark, he was at perfect liberty to change, or modify them at any time. The railroad could compel him to remove his property from their right of way, but could not compel him to ship it over its road, or deliver it at its cars.

A railroad is a common carrier, but all of its dealings, or con-

tracts with individuals, are not of necessity in that character, or capacity.

If it is contended that the defendant was a bailee of this bark, it may well be asked, in what respect was it a bailee? The word bailment is one of comprehensive signification, and includes all cases in which personal property is entrusted by one person to another, under an engagement express, or implied, to keep, to carry, to improve, to mend, to repair, or for the purpose of having any special service performed in respect to it, and when this special service shall have been accomplished, to return it to the owner, or to deliver it to another, according to the bailor's directions, or to conform to the object, or purpose of the trust, whatever it may be.

See Hutchinson on Carriers, p. 1.

What did the defendant company undertake to do, in, about, or upon the plaintiff's bark? Certainly it distinctly declined to undertake or assume any responsibility for its safekeeping, while on its right of way, and this contract was valid unless it was a contract against the negligent discharge of some duty which it owed the plaintiff, as a common carrier. If the railroad company was an ordinary bailee of the plaintiff's bark, admitting *arguendo* that it stood in that relation, then it was perfectly competent for it to contract against its own negligence. Hutchinson, supra, p. 13.

The ordinary bailee may stipulate that he shall in no event be liable, save for fraud, or its equivalent. Even common carriers, if gratuitous carriers of goods, will be liable only as mandataries, that is, for losses occurring through gross negligence. But if it is difficult upon the facts of this case to make the defendant company an ordinary bailee of the plaintiff's bark, it is even more difficult to conclude from the evidence that it stood in the relation of a common carrier to the plaintiff.

A common carrier, to cite a familiar definition, is one who undertakes a business for hire, or reward, to carry from one place to another the goooods of all persons who may apply for such carriage, provided the goods be of the kind which he professes to carry, and the person so applying agree to have them carried upon the lawful terms prescribed by the carrier, and who, if he refuses to carry such goods for those who are willing to comply with his terms, becomes liable to an action by the aggrieved party for such refusal.

It is apparent that when Mr. Young applied to the company for

a place of storage for his bark, they were not compellable to furnish it, and hence they were not liable to an action in the event they refused his request.

The true test of the character of a party, as to whether he is a common carrier, or not, says Chief Justice Simpson, is his legal duty with respect to the thing required. If he may carry, or not, as he deems best, he is a private individual, and is invested, like all other private individuals, with the right to make his own contracts. One of these rights, it may be said, is the right to contract against negligence. It has been seen that Mr. Young could not compel the company to provide him with a place of storage for his bark. It follows from this that if they agreed to furnish him such a place, being under no legal compulsion to do it, or any liability for failure in this respect, they could fix the terms of storage, including protection against liability for all forms of negligent injury to plaintiff's property, while on their premises.

There is no foundation for the contention that the bark was in the process of delivery to the defendant company, for the purposes of transportaion. The contract expressly negatives such a view. The bark was at no time in the custody, possession, or control of the company, or of its agents. It is true that the responsibility of a carrier attaches upon the delivery of goods at his warehouse, unless there are special directions given by the owner. *So. Exp. Co.* v. *McVeigh,* 20 Gratt. 264, 288. But a railroad company is not liable as a common carrier for property deposited in their warehouse to await orders for transportation. Id., p. 274.

If goods are delivered for carriage, of which the company has notice, and the place at which they are delivered is the usual place for receiving similar articles, then the responsibility of the company attaches. Even when the goods are delivered at a different place, and the company contracts to receive them at this place, it becomes liable. It is essential, however, for the goods to be delivered for carriage.

The duties and obligations of a common carrier with respect to goods, commence with their delivery to him: and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty of the obligation between the carrier and the owner of the goods. It must rest entirely upon the one, or the other, and until it has become imposed upon the

carrier by a delivery and acceptance, he cannot be held responsible for them. They must be delivered to the carrier himself, or to some agent of his, authorized to receive them on his behalf. Hutchinson, supra, p. 83. So goods stored along the line awaiting shipment, where the owner is to load them, when he can get the necessary cars, are not completely delivered to the railroad company, until they are so loaded, and ready for shipment. Id., p. 84.

Now at what period in this case was the bark delivered to the defendant company, or its agent, for shipment? When did the plaintiff surrender the duty of looking after his property, and when was this duty devolved exclusively upon the defendant company?

It appears from the contract that "whereas R. M. Young desired to store bark, scrap iron, etc., upon the premises of the railroad company," this right of storage, without value, or compensation of any sort, was extended to him upon prescribed terms. There was no compulsion upon him to accept these terms. It was not the case of an intending shipper, who is charged an excessive and illegal rate by a common carrier, and who is told that if he does not like this rate, he can ship by private conveyance. Under such circumstances the shipper is practically under compulsion to ship over the line of the common carrier, if there is no competitive service. A part of the terms prescribed by the contract was, that the plaintiff should keep his bark in good order, and at his own expense, so long as it was on the property of the company. The railroad undertook no obligation, and assumed no duty towards it. Moreover, as a saving, and concluding clause, it was provided that the company should in no wise be responsible for any damage done to the bark, or its contents, or any part thereof by fire, or other casualty whatsoever, resulting from the use of its engines on the road near . . . or otherwise. Language could not be more sweeping for the purposes intended, namely, the exclusion of liability for negligent injuries, whether arising from its own negligence, or that of others.

It is manifest that the plaintiff was on the property of the defendant for his own purposes, his own convenience, and his own advantage. For this convenience and advantage he was under no obligation, express or implied, to furnish anything in return. This being so, he took the risks attached to the place, apart from any special contract to assume those risks.

This contract, and all of its provisions, even those relating to non-liability for negligent injuries, was valid and binding, not be-

cause a common carrier can contract against his own negligence, or that of his servants, but on another, and different principle. This contract, as has been noted, was not made by Mr. Young with the railroad company in respect to any of its duties as a common carrier, but in respect to something which it was not compellable to do. Hence as to this subject matter, or undertaking, it could limit its liability for negligence.

"A common carrier may undoubtedly become a private carrier, or bailee for hire, when as a matter of accommodation, or special engagement, he undertakes to carry something which it is not his business to carry. The relation in such a case is changed from that of a common carrier to that of a private carrier, and where this is the effect of the special engagement, the carrier it not liable, as a common carrier, and cannot be proceeded against as such." Hutchinson, supra, p. 34.

The law as to a bare licensee who is on the property of a railroad company, for his own purposes, has been stated in *N. & W. Company* v. *Wood,* 99 Va. 156, as follows:

"One who is permitted by the passive acquiescence of a railroad company to come upon its depot platform, for his own purposes, in no way connected with the railroad company, as a bare licensee, though relieved from the responsibilities of a trespasser, takes upon himself all the ordinary risks attached to the place, and the business carried on there. The company does not owe him the same duty which it owes to one who is there in discharge of business with the company, or as a passenger, and the same presumptions will not be made, as in case of passengers, or of persons lawfully upon the premises for the purpose of transacting business with the company." "He (a bare licensee) must take the premises with its concomitant conditions, and may be, perils." *Hounsell* v. *Smith,* 7 C. B. (N. S.) 73.

The railroad company in this case owed Mr. Young no duty save that which every citizen owes to another. It had no right to intentionally injure him, and for such intentional injury, or gross negligence, such as would amount to intentional injury, it was liable. But it can hardly be said that the negligence of the defendant company in the first instance, if any, was gross. After the first rain the plaintiff saw the condition of the culvert, and of his bark. He was

at liberty to remove his bark, and it was his duty to do so, if he apprehended that another rain might inflict upon it additional damage, of a similar character. Failing to do this, he was at fault, and in the event of another rain, and of further injury to his property, he was properly chargeable with negligence.

In this case the defendant company was protected by the terms of its contract from liability for the injury sustained, under the circumstances revealed by the evidence. An order in conformity with this opinion can be prepared, and will be entered during the present term of this court.